Supreme Court, U.S.
FILED
DEC 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-561

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

GEORGE F. GRODE, Insurance Commissioner
of the Commonwealth of Pennsylvania,
Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange, and
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY, and
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Texas Stock Insurance Companies,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE

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RESPONDENTS' BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE

ARGUMENT

Amici's Brief, like that of petitioner, ignores the fundamental premise of the Third Circuit's decision, namely, that respondents would suffer "devastating economic consequences" from abstention. They also overlook the Third Circuit's recognition of the obviously "vague claim of risks to the state from a Texas bank not doing business in Pennsylvania. . . ." 792 F.2d at 363. Instead, they focus upon an issue not even present in this case—whether states should be permitted to "limit the ability of a lending institution to sell insurance." Amici Brief at 6.

The issue here is not whether a bank may sell insurance. USAA Federal Savings Bank has never sold insurance. Instead, the issue is whether the Commissioner may penalize respondents solely for their federally approved affiliation with a bank that does not sell insurance and does no business in Pennsylvania. The amici thus fundamentally misapprehend the truly narrow issue of this case.

The amici also purportedly seek to uphold the "ability of the state to protect consumers. . . ." Amici Brief at 17-18. Their true interest, however, undoubtedly lies elsewhere. In papers filed with the District Court, these same amici stated that they "are in competition with plaintiffs [i.e. respondents] as Pennsylvania licensed insurance agents or brokers. . . ."[1] It is not difficult to see why the amici have consistently supported the revocation of USAA's licenses. If the licenses of USAA (which sells directly to officers in the armed services without insurance agents) are revoked, 40,000 policyholders who paid USAA $35,000,000.00 in premiums in 1983 will

1. Motion For Intervention Or Request For Leave To File A Brief Of An Amicus Curiae at 4 (filed February 27, 1985).

need insurance coverage. Thus, while purporting to uphold the state's interest in prohibiting unfair competitive practices, the insurance agents that comprise the amici are actually attempting, quite simply, to eliminate a substantial competitor.

Moreover, contrary to the suggestion of the amici, the Third Circuit's decision in no sense causes a "disruption" of the ability of concerned states to regulate the business of insurance within their borders.[2] *See* Amici Brief at 12-13. As noted above, the subject matter of this lawsuit is the affiliation between Texas-domiciled insurance companies and a federal savings bank in Texas. The amici have failed to mention that the Texas Board of Insurance —which is the primary regulator of Texas insurance companies such as USAA — received advance notification of the affiliation with the federal savings bank and has made no objection. *See* Affidavit of William McCrae, Supporting Plaintiffs' Motion for Summary Judgment, filed in the District Court on January 25, 1985. In short, although the amici cite various state statutes to show the alleged interest of concerned states (including Texas) in the subject matter of this action, the state having the most direct concern with the affiliation in question, namely Texas, where both USAA and its bank are located, has never objected to such affiliation.

Amici also challenge the Third Circuit's conclusion that *Pullman* abstention is not appropriate where, as here, the federal plaintiffs have presented a substantial preemption claim. Amici seek the Court's review of this aspect of the lower court's holding despite the existence of an independent ground for the decision, namely, the "devastating" consequences that would stem from abstention. In this regard, the amici attempt, but utterly fail, to establish a conflict among the circuits. At most,

2. Significantly, no one from any of these other jurisdictions has sought to participate in this case as an amicus curaie. The only amici to come forward have been Pennsylvania insurance agents that are in competition with USAA for the sale of insurance.

the amici cite several decisions involving preemption claims where courts have abstained. *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984); *Druker v. Sullivan*, 458 F.2d 1272 (1st Cir. 1972). But none of these cases addresses the issue at hand. None cites to any of the others, and none recognizes any sort of conflict among the circuits. Obviously, the only "conflict" found is in the eyes of the amici. Thus, the amici have presented no basis whatsoever warranting a grant of certiorari by the Court.

Moreover, as pointed out above, the substantial alternative ground of the Third Circuit's decision, namely, its findings of severe prejudice that would result from abstention, eliminates the need, if any, for review by the Court of this "perceived" conflict.

Finally, the amici suggest that USAA was "permitted to present its federal constitutional claims to the Insurance Commissioner." Amici Brief at 10 n.1. The amici neglect to mention that USAA, in the state administrative proceeding, expressly reserved its rights to have all its constitutional claims and defenses determined by the federal courts.[3] In thus reserving their rights, respondents satisfied the requirements of the Court in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 420-22 (1964). That they urged the Commissioner to interpret the statute "against the backdrop of a federal constitutional challenge" in no sense undermines their right to have their Supremacy Clause and constitutional claims determined by a federal court. *Id.* at 420.

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3. *See* Answer to Order to Show Cause at 7, filed by USAA in the Pennsylvania Insurance Department on March 1, 1985 in *In Re: United Services Automobile Association*, No. C84-12-5.

CONCLUSION

For these reasons, and the reasons set forth in respondents' Brief in Opposition to the Petition for a Writ of Certiorari, the petition should be denied, in all respects.

Respectfully submitted,

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